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Argument

1 plaintiffs in the case subject to the scrutiny of litigation to  
2 expect that those named plaintiffs would then be subject to  
3 another search while the case was going on, much less during  
4 the ten-day period that a temporary restraining order would be  
5 in effect?

6 MR. MAER: Let me start with sort of the initial  
7 premise that you set out there. The reason I mention this is  
8 that, why these practices have gone unchallenged, the  
9 reluctance.

10 Certainly we have told our clients that we would  
11 expect that such commitments would be made. I have no reason  
12 to present any evidence that they won't be respected in this  
13 case. That still doesn't stop our clients from being fearful  
14 of stepping forward here, either the ones we've talked to or  
15 what we believe are hundreds of other families who haven't  
16 stepped forward because of that fear. That was my point.

17 As Mr. Gennardo said, our clients are part of this  
18 class that they will conduct raids against in the future, be it  
19 this week or next week. They have to meet the quota of 1,000  
20 arrests per year, so these arrests are ongoing.

21 So will it be our plaintiffs? We can't say with any  
22 certainty.

23 But will it be someone in our class, in the group  
24 we're seeking here to stop these raids and stop these  
25 unconstitutional activities? Certainly.

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1 We don't know even how many raids there were the week  
2 before last, but to meet this quota -- and maybe this can be  
3 addressed by the U.S. Attorney. How many raids they have had  
4 in the last month, how many they have had this year.

5 So the number is substantial. That's what we're  
6 seeking relief from, both for our plaintiffs as well as for the  
7 larger group of Latino households that we're seeking to  
8 represent here.

9 It is under that umbrella that our plaintiffs need the  
10 relief just like everybody else.

11 THE COURT: Go ahead.

12 MR. MAER: You also had raised the question about  
13 under Deshawn whether this evidence could be used against them.

14 Yes, it can be. Eight of our plaintiffs were put into  
15 proceedings after these raids. That evidence and their seizure  
16 is a result obviously from our perspective of these unlawful  
17 Fourth Amendment violations. So, yes, this evidence --

18 THE COURT: But the papers aren't clear that the  
19 searches resulted in any evidence as opposed to a seizure of  
20 persons. I thought that your colleague said that you really  
21 were not attempting to litigate in this action the removal  
22 proceedings, which are a separate issue.

23 MR. MAER: Yes, your Honor.

24 But again, be it their testimony -- we don't know  
25 whether any sort of documentary proof, evidence, was obtained

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1 in these raids. In one of the raids I think described it's  
2 clear they went through people's drawers, I believe, and so it  
3 is likely, but we don't know that documentary evidence was  
4 obtained in these raids that would be used in these hearings.

5 So we believe that's the type of continuing ongoing  
6 harm or prospect of harm that Deshawn was designed, that the  
7 Court intended to make protected and something that can be  
8 challenged in standing under the Lyons test.

9 THE COURT: Go ahead.

10 MR. MAER: The last point is, you also raised the  
11 perspective that we're asking that the agency change its  
12 behavior, the way it does its normal course of business,  
13 something that it's constitutionally entitled to do.

14 There's a case -- I apologize, we did not cite it --  
15 that deals with this very constellation of facts. I wish I  
16 could pronounce it better Mastrovincenzo v. City of New York,  
17 435 F.3d 78, that deals with the New York City Police  
18 Department and its actions towards unlicensed street vendors.

19 There the defendants made the same argument that they  
20 did on Friday and that your Honor is concerned about, and I  
21 quote here, "If, as defendants suggest, the action prohibited  
22 in the instant case is so regular and consistent that the  
23 injunction must be designated as de facto mandatory, and then  
24 it goes on to say that that isn't the way the court viewed it,  
25 that just because the government agency regularly undertakes

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1 this activity that it does not somehow convert what you might  
2 normally think of as simply a prohibitory injunction to become  
3 mandatory, that still you just look at the nature of the  
4 injunction itself. It prohibits the government from doing  
5 something, even something they do all of the time.

6 That is on page 90 of that decision.

7 As for expedited discovery, there are two tests that  
8 have been articulated and that are still at work here in the  
9 Second Circuit.

10 One is called, it comes from the case Notaro v. Koch,  
11 and that is outlined in our papers, where in essence it's only  
12 like a preliminary injunction standard that is applied to  
13 justify a request for expedited discovery.

14 Of late, in the last 10, 15 years, a second test has  
15 evolved, recognizing that, particularly when plaintiffs are  
16 seeking a preliminary injunction, evidence to pursue one, that  
17 it doesn't make sense to hold them to that same standard.

18 That was best articulated in Ayyash v. Bank Al-Madina,  
19 233 F.R.D. 325 (S.D.N.Y. 2005). That's just a good cause  
20 standard. They just look at all the circumstances in a  
21 situation.

22 The Court did articulate three categories of how to  
23 approach this issue under this good cause test: First, whether  
24 there's good cause to order expedited discovery; second,  
25 whether the request is reasonable in light of all the

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1 surrounding circumstances; and third, whether the need for  
2 expedited discovery outweighs the prejudice to the responding  
3 party.

4 I don't think that there can be much argument that the  
5 need for expedited discovery here is compelling. The concerns  
6 that would be addressed by obtaining the preliminary injunction  
7 are as high as could be imagined in terms of giving priority to  
8 getting expedited discovery.

9 The next question is whether the request is reasonable  
10 in light of all the surrounding circumstances. Let me address  
11 specifically the different categories of discovery that we're  
12 seeking. The first category is outlined in our memo of law --

13 THE COURT: Let me stop you for a moment on expedited  
14 discovery. I raised an issue with respect to the unusual  
15 nature of the papers last time.

16 MR. MAER: Yes.

17 THE COURT: And we discussed that some.

18 The only place where the items of expedited discovery  
19 are listed is the memorandum of law. The way in which a  
20 request for expedited discovery would normally come up is  
21 there's a motion for a preliminary injunction; there is a  
22 request at the same time for expedited discovery which attaches  
23 discovery requests. Discovery requests give the other side an  
24 opportunity to interpose objections, make claims that the  
25 discovery request is insufficiently precise, unlimited with

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1 respect to time, or otherwise subject to any one of a number of  
2 objections that might be posed from privacy interests, to  
3 privilege interests and the like.

4 There are no discovery requests that are included in  
5 the papers. The only request for expedited discovery comes in  
6 the memorandum of law that sets out general categories that the  
7 plaintiffs are interested in obtaining.

8 So it's somewhat difficult to say, OK, produce that,  
9 when there's no request for documents under Rule 34. There are  
10 none of the kinds of discovery requests that normally arise,  
11 and thus, no opportunity to file specific objections or resolve  
12 them.

13 MR. GENNARDO: Your Honor, we will have those to you  
14 and to the government by the morning.

15 THE COURT: Go ahead.

16 MR. MAER: I apologize.

17 THE COURT: It is all right. It is OK. I'm just  
18 pointing it out because I raised it last time.

19 MR. MAER: Yes.

20 I can only assure you we have been very busy, but we  
21 just did not produce that for this afternoon's hearing, but  
22 we'll do so.

23 THE COURT: It's all right. I was just attempting to  
24 raise a concern with respect to a request that just asks me to  
25 say, OK, take expedited discovery.

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1 MR. MAER: Yes.

2 I think there is a utility in discussing the three  
3 categories of information that we are seeking and that will  
4 give guidance to the actual request itself.

5 The first one is the policies, the documentations  
6 concerning ICE's policies, practices, procedures, training,  
7 concerning the conduct of these home raids and how they're  
8 identified.

9 It is a self-evident set of documents. Obviously, it  
10 is critical to understand the government's liability and  
11 actions here, what do their policies say or what do they not  
12 say.

13 We don't know if these actions are the result of  
14 inadequate supervision, if they are the result of directly the  
15 result of policies or protocols or whether it's the result of a  
16 failure to supervise. We just don't know. That request I  
17 think is pretty self-evident as to its relevancy and its ease  
18 of production.

19 I believe Ms. Buchanan here is the head of the  
20 immigration unit. I am not sure how it's referred to in the  
21 Southern District here. I assume that she would know where  
22 these policies are.

23 The second category is the information as to the home  
24 raids themselves. What we seek there is, since January, when  
25 our plaintiffs began to suffer these raids, we want to get a



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1 sense of both the scope of the raids, how many people were  
2 arrested, how many homes, as well as sort of a minimal set of  
3 information as to the warrants used, the reports that were  
4 generated by those raids, the address of those raids and  
5 whether the arrests were in fact of the person targeted by that  
6 raid or whether they were collateral arrests as we have  
7 described them in our papers.

8 Third is the names of the agents involved in the  
9 raids. We would seek that information both to obtain all  
10 possible witnesses that we would be able to call for a  
11 preliminary injunction hearing to get a sense of which agents  
12 might be most useful to depose or to present at trial and also  
13 to understand how these raids were staffed, how many people  
14 were involved in each of these raids. We think that would be  
15 very helpful for the Court in addressing the preliminary  
16 injunction motion.

17 THE COURT: All right.

18 MR. MAER: Thank you, your Honor.

19 MR. GENNARDO: Your Honor, if I could just wrap up  
20 with a few comments and then turn it over.

21 Your Honor had asked earlier why would the government  
22 revisit a plaintiff who's brought suit against the government.  
23 I would ask why would the government go back to Mrs. De La  
24 Rosa's house after they had already been there once and been  
25 told that the Miguel the government was looking for wasn't



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1 there?

2 Why would they return 13 months later seeking the same  
3 person? Why would the government engage in --

4 THE COURT: But she wasn't a plaintiff in the case, so  
5 that the focus on the importance of assuring that there be no  
6 retaliation against a plaintiff in a case that was proceeding  
7 in court had not been given to her. Indeed, she has not been a  
8 plaintiff in this action, and no retaliation has occurred so  
9 far as the plaintiffs have told me with respect to any of the  
10 plaintiffs in this action. Not only no retaliation, but even  
11 prior to the time that the action was brought, no repeat  
12 visits, no repeat search.

13 MR. GENNARDO: Your Honor, I think you had raised the  
14 point to try to make a point that in fact no competent,  
15 intelligent agency of the government would actually go out and  
16 raid the named plaintiffs who are accusing them of misconduct.

17 THE COURT: It is not only the agency, but presumably  
18 the agency advised by counsel handling litigation on behalf of  
19 the agency in court. When the immigration service or the  
20 attorney general is required to defend specific cases in court,  
21 the immigration service doesn't go out there on its own. It's  
22 being represented by lawyers who advise the agency and who in  
23 turn make representations to the Court.

24 MR. GENNARDO: Those same lawyers, your Honor, are  
25 representing the government in the face of Nassau County

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1 writing public letters to senior ICE officials saying your  
2 agents are acting like cowboys. They're engaging in illegal  
3 conduct, and what do they do? Three or four days later they do  
4 it all over again.

5 The point is this is not a competent agency. This is  
6 an agency that is violating constitutional rights day in and  
7 day out, the agency that's own inspector general has criticized  
8 for being incompetent, being disorganized, being understaffed  
9 and acting without proper direction.

10 That's why our plaintiffs are at risk. This is not an  
11 agency that is organized and acting in an organized way, but in  
12 a way that you and I would normally hope and expect that a  
13 governmental agency would be acting.

14 Your Honor was kind enough last time to get assurances  
15 from the government that they would not retaliate against our  
16 clients. It would be even more helpful to us if the government  
17 would give assurances that the Latino community is not going to  
18 suffer unconstitutional, nonconsensual searches and seizures of  
19 their homes and that the government hasn't done.

20 Our clients, that community, as Mr. Maer has pointed  
21 out previously, lives in daily fear of those types of raids.  
22 Those are real and immediate fears on part of that community,  
23 given the plans for future raids and the fact that raids are  
24 ongoing and the fact that ICE has not stopped those raids even  
25 in the face of very pointed and strong criticism by independent

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1 third-party government officials.

2 Earlier you had asked me whether any of our clients  
3 were undocumented immigrants. I misspoke slightly. I should  
4 have said that they are being charged as undocumented aliens  
5 and not that in fact they were. They are being charged that  
6 way. There are proceedings against them for being undocumented  
7 aliens, but certainly nothing in our complaint makes that fact.  
8 So, thank you very much, your Honor.

9 THE COURT: OK. Thank you.

10 All right. Ms. Wolstein.

11 MS. WOLSTEIN: Thank you, your Honor. I am going  
12 address a few points in the reply brief as well as briefly the  
13 standing and then Mr. Cargo --

14 THE COURT: Please keep your voice up.

15 MS. WOLSTEIN: Yes, your Honor. I apologize.

16 I will address briefly the standing issue because I  
17 don't think there's a huge amount to add, as well as a few  
18 points in the reply brief, and Mr. Cargo will address the  
19 jurisdictional provisions of the Immigration and Nationality  
20 Act.

21 As to standing, your Honor, you heard Mr. Maer concede  
22 that they cannot say with certainty that it will be their  
23 plaintiffs who will be again subject allegedly to  
24 unconstitutional entries into the house. Rather, what they are  
25 saying is that it will be someone within the class that they're

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1 claiming to seek to certify.

2 Your Honor, the Supreme Court has said, and it's quite  
3 clear that they cannot bootstrap class action allegations on to  
4 obtaining standing. That's the O'Shea v. Littleton case, which  
5 is discussed extensively in the Lyons case. That's 414 U.S.488  
6 at 495: "If none of the named plaintiffs purporting to  
7 represent a class establishes the requisite of a case or  
8 controversy with the defendants, none may seek relief on behalf  
9 of himself or any other member of the class."

10 I also direct the Court to a case from this district,  
11 Miller v. Silverman, 951 F.Supp. 485. I don't have a point  
12 cite, I apologize, but: "The fact that plaintiffs purport to  
13 represent a broader class adds nothing to the question of  
14 standing, for even named plaintiffs who represent a class must  
15 allege and show that they personally have been injured, not  
16 that the injury has been suffered by other unidentified members  
17 of the class to which they belong."

18 As far as further on standing, I think your Honor has  
19 framed the question accurately. The question for the TRO is  
20 whether these plaintiffs will suffer imminent, concrete  
21 irreparable harm in the next ten days.

22 Nothing that has been said today or that is in the  
23 reply brief alters the legal analysis that prevails here, and  
24 that is the fact that a past violation of the Fourth Amendment,  
25 even if true, which we strongly dispute the plaintiffs' version

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1 of the facts, but even assuming the truth for purposes of this  
2 motion, nothing about these alleged past violations reflects or  
3 gives rise to any immediate, irreparable, concrete,  
4 nonspeculative injury of the kind that is required to establish  
5 standing, as well as, of course, to establish the entitlement  
6 to injunctive relief.

7 As to the Delgado affidavit, which we haven't seen, as  
8 I mentioned, the Court is quite right that she is not a  
9 plaintiff. So the fact that they returned 13 months later,  
10 which is far more than ten days later, says nothing about  
11 whether these plaintiffs are at risk of immediate irreparable  
12 harm.

13 In fact, even the allegations of a policy or practice  
14 add nothing to the likelihood of immediate, irreparable injury.  
15 In Lyons there was in fact a police department policy of  
16 chokehold. You can find that at page 899, among others, of the  
17 Court's opinion.

18 In fact, the people who died from the chokehold were  
19 members of a protected class, they were black. I would add  
20 that the future raids are planned generally, or entries are  
21 planned as part of ICE's enforcement program also says nothing  
22 as to these plaintiffs that ICE will return and commit  
23 allegedly unconstitutional acts.

24 Just a few specific points in response to the reply  
25 brief: Page 3, the claim is "ICE agents either broke down the

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1 entry door to plaintiffs' home or pushed their way past whoever  
2 opened the door without consent. These accounts are echoed and  
3 independently confirmed by the letters attached to the  
4 complaint."

5 That is absolutely not correct. The letters say  
6 nothing of whether unconstitutional actions occurred. The  
7 letter of the police commissioner addresses three things. They  
8 say you didn't e-mail us the list of targets like you said you  
9 would. You used an outdated picture in one case, and we have  
10 tactical concerns, that the agents don't train together and  
11 weren't wearing consistent uniforms.

12 As to the mandatory versus prohibitory injunction, I  
13 think the Court was correct in the analysis. The plaintiffs  
14 are not claiming that the injunction is merely an injunction  
15 prohibiting the government from violating the Fourth Amendment.  
16 The government is already under a duty not to violate the  
17 Fourth Amendment.

18 What they are seeking is to alter the basic structure  
19 of this particular law enforcement operation by requiring that  
20 agents obtain a warrant rather than proceeding on consent. In  
21 fact, they actually even want to prohibit the seeking of  
22 consent, so that would mean effectively shutting down the  
23 entire program.

24 THE COURT: Wouldn't that be a prohibitory rather than  
25 mandatory injunction, prohibit them from relying on consent?

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1 They are not required to get court-ordered warrants. They can  
2 simply choose not to search.

3 MS. WOLSTEIN: The status quo here is not hard to  
4 discern. The status quo is that an operation that proceeds on  
5 consent, which is very much in dispute -- an injunction that  
6 would prohibit law enforcement officials from seeking consent  
7 would certainly alter the status quo and would basically shut  
8 down the operation if they were in fact prohibited from seeking  
9 consent.

10 The use of the word "prohibit" doesn't tell us very  
11 much. The question is what the operation is, what the status  
12 quo is, and how does the injunction attempt to change that.  
13 Here it's a very dramatic proposed alteration that would either  
14 require the use of warrants or prohibit, as the Court said, an  
15 otherwise perfectly constitutional entry based on consent.

16 I can turn it over to Mr. Cargo now to address the INA  
17 and the expedited discovery issues, unless the Court has  
18 questions.

19 THE COURT: No. Go ahead, Mr. Cargo.

20 MR. CARGO: Good afternoon, your Honor, Shane Cargo  
21 for the government.

22 Just very briefly on the two jurisdictional provisions  
23 that the government relies upon here, I think it is helpful to  
24 take one big step back and understand how these two provisions  
25 work with one another.



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1           The Real ID Act, as the Supreme Court said, effected a  
2   sea change in the way immigration challenges are handled in  
3   federal courts. In effect, it funnels all challenges to  
4   removal orders into the circuit courts of appeal. There's no  
5   longer such a thing as a habeas corpus proceeding in district  
6   court. There is no longer such a thing as an All Writs Act  
7   proceeding in district court.

8           However a plaintiff chooses to denominate his action,  
9   if it seeks to challenge a removal order, it must be brought in  
10   the circuit within 30 days of him receiving a final  
11   administrative order.

12           1252(g), on the other hand, is only triggered when the  
13   alien seeks a standalone stay of removal, that is, they are  
14   seeking a stay from the district court that is not connected  
15   with a challenge to the removal order. I believe I heard  
16   plaintiffs concede that they are not challenging their removal  
17   orders in this case, so clearly that implicates 1252(g).

18           Now, it's drafted very broadly. It prohibits,  
19   withdraws jurisdiction to review any decision or action by the  
20   attorney general to commence proceedings, adjudicate cases, or  
21   execute removal orders against any alien under this chapter.

22           If you look at the scope of the second order that  
23   they're seeking in the TRO, they seek an order from this court  
24   prohibiting the defendants from contacting, retaliating  
25   against, arresting, prosecuting, or deporting the named

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1 plaintiffs in this action.

2 They are seeking a stay from this court, your Honor,  
3 to stay the deportation of any aliens who are now in  
4 proceedings. The status of the plaintiffs has been a little  
5 unclear up to this point, but their latest papers make it be  
6 known that several of the plaintiffs are in removal  
7 proceedings. That's a decision by the attorney general to  
8 place the alien in proceedings, and when the alien is subject  
9 to a final removal order it will be up to the attorney  
10 general's discretion to execute that removal order.

11 So that's clearly covered by 1252(g), and plaintiffs  
12 have tied themselves in knots trying to avoid those two very  
13 clear jurisdictional provisions.

14 But that's exactly what Congress was intending.  
15 Congress did not want aliens to forestall removal by bringing  
16 district court actions seeking a stay.

17 If the Court has no questions, I'll move on briefly to  
18 the discovery requests.

19 As your Honor mentioned, these are not made pursuant  
20 to a proper motion. If they had been, the government would  
21 have an opportunity to interpose objections concerning the  
22 scope and the sweep and privilege and all of those types of  
23 things.

24 Let me address the first two.

25 They seek documents concerning ICE's policies,

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1 practices, procedures, and training related to home searches.  
2 They also seek facts relating to home raids conducted in the  
3 past ten months.

4 The problem with these two requests, your Honor, is  
5 that they go to the ultimate relief that the plaintiffs are  
6 seeking in this case. Allowing discovery at this point would  
7 in effect permit the plaintiffs to circumvent the very  
8 substantial standing objections that the government has raised  
9 and will raise by formal motion later in this litigation.

10 Mr. Maer said to the Court that those documents will  
11 be very helpful to the Court. But the plaintiffs have never  
12 articulated why they will be irreparably harmed if those  
13 documents are not produced at this point. That's the standard  
14 to get expedited rediscovery.

15 The third and fourth are the names of the agents  
16 involved in the raids and the names and locations of all the  
17 individuals detained since September of 2007.

18 Again, the problem with these two requests is that  
19 they have nothing to do with the preliminary injunction motion.  
20 The plaintiffs haven't articulated how these requests will help  
21 them establish irreparable harm.

22 I should mention that these are unbelievably  
23 burdensome. They go back the past ten months. They want facts  
24 relating to home raids conducted the past 10 months. These  
25 officers head out every morning, so you are talking about

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1 literally hundreds and hundreds of searches at this point. So  
2 a document request like that is extremely burdensome at this  
3 preliminary stage.

4 If your Honor has no further questions, the government  
5 is prepared to rest on its papers.

6 THE COURT: OK.

7 MR. GENNARDO: Your Honor, you have been very  
8 indulgent of us. Would you allow me just a few more minutes?

9 THE COURT: Sure. Did you have the affidavit to pass  
10 up to me and to the government? No?

11 MR. GENNARDO: Not as of yet, your Honor.

12 THE COURT: I'll accept your representations for is  
13 contained in the affidavit. I've read obviously all the papers  
14 submitted to me, including the reply memo that describes what's  
15 in the supporting affirmation.

16 Go ahead.

17 MR. GENNARDO: Thank you very much for that. I  
18 appreciate that. Your Honor I just wanted to correct a few  
19 things that were just said and to point out a few things that  
20 were just said.

21 First of all, it is true that Mr. Maer conceded that  
22 there was no certainty that any of the named plaintiffs would  
23 be amongst those who suffered a constitutionally improper  
24 search and seizure. He certainly did not concede that there  
25 was not a likelihood that they would not be a victim of an

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1 unconstitutional search and seizure. In fact, we've argued and  
2 we've pled in our papers that our clients are within an  
3 identifiable class and that there is a practice and a policy  
4 and procedure of targeting that class for unconstitutional  
5 raids.

6 The case law supports very much our position that  
7 where the government has that type of practice and policy and  
8 procedure that standing exists. I will note to you that in  
9 Deshawn the Second Circuit noted that in Lyons, in  
10 distinguishing Lyons, "There was no proof of a pattern of  
11 illegality. In contrast, the challenged methods in this case  
12 are officially endorsed policies."

13 From that sentence the Court went on to grant the  
14 preliminary -- or at least find that there was standing to move  
15 for the preliminary injunction.

16 In Leduc, again distinguishing Lyons, the Court in the  
17 Ninth Circuit noted that the Supreme Court has repeatedly  
18 upheld the appropriateness of federal injunctive relief to  
19 combat a pattern of illicit law enforcement behavior. That is  
20 exactly what we alleged here.

21 THE COURT: All that Deshawn did, though, was to say  
22 that there was standing in Deshawn.

23 MR. GENNARDO: Correct.

24 THE COURT: And then proceeded to affirm the denial of  
25 the preliminary injunction and the grant of summary judgment

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1 dismissing the case.

2 MR. GENNARDO: Because the plaintiffs had failed to  
3 state a claim. That is very different here. The government  
4 has not said that we have failed to state a claim here.

5 If the Court dismissed the complaint before it could  
6 reach the preliminary injunction motion, for obvious reasons it  
7 wouldn't then reach the preliminary injunction motion. Again,  
8 we have alleged here that our plaintiffs are subject to and  
9 likely to be victims of imminent constitutional harms simply  
10 for being who they are and where they live.

11 The courts again have numerous times found that in  
12 those situations there is standing to seek injunctive relief.  
13 I refer your Honor to Leduc again. I won't quote from there.

14 The fact that Ms. Delgado is not a plaintiff here as  
15 of yet misses the point. The purpose of that affidavit is to  
16 show that in fact, having been victimized by ICE once does not  
17 mean you will not be victimized again.

18 As I stated earlier, the fact that you are on the  
19 government's radar, the fact that the government believes you  
20 are a potential target and the fact that the government is not  
21 coordinated and competent enough to keep its information  
22 straight puts you at a heightened risk of intrusion by the  
23 government. It does not lower the risk of intrusion.

24 Ms. Wolstein said that Lyons had a policy of giving  
25 chokeholds. That's not correct. The policy was discretionary.

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1 The Court in that case found that it was for too attenuated to  
2 say that Mr. Lyons would suffer a chokehold in the future. He  
3 would have to be first stopped and then the officer would have  
4 to use his or her individual discretion to decide whether to  
5 give a chokehold or not.

6 I'll just wrap up, your Honor, by noting the very  
7 concerning concession just made by the government. There are  
8 daily raids going on; hundreds and hundreds of raids going on.  
9 Those are the words from the government.

10 THE COURT: But how does that help you?

11 In the papers before me there are approximately nine  
12 incidents involving approximately 23 plaintiffs. Out of  
13 hundreds and hundreds of raids, searches, we have nine  
14 incidents of alleged abuses on the basis of which the  
15 plaintiffs ask that I enjoin all further searches, even  
16 searches which would be constitutional on consent, on the basis  
17 of nine incidents which are in the papers before me.

18 MR. GENNARDO: Your Honor, it can't be the standard  
19 that we have to join hundreds of plaintiffs to make out our  
20 case.

21 THE COURT: No.

22 But my question was how does the fact that hundreds of  
23 searches occur help an argument that searches which are  
24 otherwise constitutional on consent should be prohibited?

25 Why isn't that the equivalent of an argument that



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Argument

1 because there are incidents of abuses that occur in any given  
2 police department which are then subject to litigation in terms  
3 of motions to suppress at criminal trial and actions for  
4 damages, whether it be under a Bivens standard or under a 1983  
5 standard, that if you gather together nine searches by similar  
6 agents of a department that warrants relief to prevent searches  
7 that are even constitutional.

8 I ask that question solely for purposes of a temporary  
9 restraining order, because there is no motion for a preliminary  
10 injunction before me, and there is no motion for obviously a  
11 permanent injunction, which could only be decided after a trial  
12 on the merits.

13 But you are asking me to stop what would otherwise be  
14 constitutional searches based on nine incidents.

15 MR. GENNARDO: Your Honor, we are not asking you to  
16 stop constitutional searches by any means. What we are asking  
17 is to stop the unconstitutional searches by the government.

18 THE COURT: But the temporary restraining order that's  
19 being asked for would say that searches cannot occur unless  
20 based upon a judicially authorized warrant, which would exclude  
21 all other even constitutional bases for a search, including a  
22 consent search.

23 MR. GENNARDO: Your Honor, we are not talking about  
24 constitutional searches here. That provision is purely meant  
25 to protect our clients from irreparable harm.

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Argument

1 ICE has demonstrated not just in nine plaintiffs --  
2 those are just the nine that we have had the opportunity to  
3 bring to your Honor in this very short time frame. On the  
4 night of September 24 and 26 there were hundreds of people  
5 victimized by the raids that the Nassau County Executive  
6 characterized -- and again Ms. Wolstein was not correct on  
7 this: "I bring to your attention serious allegations of  
8 misconduct and malfeasance. I condemn any tactical actions  
9 which crossed the lines of legality and law enforcement just  
10 practices."

11 We are not talking about nine plaintiffs here. We are  
12 talking about hundreds of plaintiffs across lower New York  
13 State and across the country. We have brought articles ranging  
14 from Oregon to Idaho; complaints lodged in Georgia; articles  
15 about what's happening in lower New York State.

16 These nine plaintiffs are just purely representative  
17 of what's happening in the hundreds of raids that are happening  
18 daily, that have happened in the last ten months, are  
19 continuing to happen.

20 The relevance of that concession is that our clients  
21 are very much at risk of having another unconstitutional home  
22 raid inflicted upon them. That's the basis on which I raise  
23 that point.

24 Thank you very much, your Honor. I appreciate all the  
25 time.

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Argument

1 THE COURT: No problem.

2 I have a limited application before me at the moment.  
3 It is for a temporary restraining order which seeks temporary  
4 relief, including enjoining the defendants from entering or  
5 searching any home or seeking consent to enter or search any  
6 home within the jurisdiction of the New York City regional  
7 office and/or field office of ICE without first obtaining a  
8 judicially ordered search warrant.

9 A temporary restraining order is an extraordinary form  
10 of relief that provides relief for a period of ten days,  
11 although it can be renewed for another period of ten days.

12 In general, to establish a justification for a  
13 temporary restraining order, the plaintiff must establish  
14 immediate and irreparable injury and a likelihood of success on  
15 the merits.

16 Although there are arguments why in the case of  
17 injunctions against actions in the public interest, there is a  
18 higher standard, there is also some case law that establishes a  
19 somewhat lesser standard involving not a likelihood of success  
20 on the merits but serious questions going to the merits and a  
21 balance of hardships tipping decidedly in favor of the movant.

22 Even if a lesser standard were applied in this case,  
23 there is no showing that a temporary restraining order is  
24 warranted. Under any standard the plaintiffs would be required  
25 to show immediate and irreparable injury which is real and not

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Argument

1 speculative, which is not conjectural or hypothetical.

2 The alleged injury in this case to be prevented is the  
3 recurrence of an allegedly unconstitutional search involving  
4 the plaintiffs. There is no reasonable showing of immediate  
5 and irreparable injury to these plaintiffs.

6 There are numerous plaintiffs, some of whom had  
7 searches conducted in February and April of 2007. In no case  
8 of any plaintiff has there been a subsequent search. The  
9 plaintiffs proffer that they have one individual who had a  
10 recurrent search 13 months after the first search, but that  
11 person is not a plaintiff in this action, and a search that was  
12 a recurrent search that occurred 13 months after the first  
13 search would not establish the prospect of immediate and  
14 irreparable injury for these plaintiffs for the term of the  
15 temporary restraining order. The plaintiffs have not shown  
16 that they will be the subject of an unconstitutional search in  
17 the period of time to be covered by the temporary restraining  
18 order.

19 Similarly, the plaintiffs have not shown a likelihood  
20 of success on the merits or serious questions going to the  
21 merits. In City of Los Angeles v. Lyons, 461 U.S. 95 (1983),  
22 the Supreme Court drew a distinction between requests for an  
23 injunction and claims for damages and made it clear that in  
24 assessing the likelihood of success on the merits for purposes  
25 of an injunction the Court would have to assess similar issues

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Argument

1 of future substantial and irreparable injury which cannot be  
2 remedied at law.

3 The Court made it clear that this inquiry with respect  
4 to the merits is similar to the issue of standing for a claim  
5 of equitable relief. In this case, for purposes of the very  
6 preliminary temporary restraining order, the plaintiffs have  
7 failed to make a sufficient showing of likelihood of success on  
8 the merits of their claim for equitable relief.

9 This case is different from Deshawn E. v. Safir, 156  
10 F.3d 340 (2d Cir. 1998), on which the plaintiffs rely. There  
11 the plaintiff class was allegedly in delinquency proceedings  
12 where the alleged fruits of the allegedly unconstitutional  
13 conduct were being used.

14 In this case, the thrust of the arguments are that the  
15 ongoing searches should be stopped without any evidence that  
16 the searches will be directed against these plaintiffs, and the  
17 plaintiffs have attempted to, in fact, draw a distinction  
18 between the issue of the searches and the ongoing removal  
19 proceedings with respect to some of the plaintiffs.

20 A final note with respect to the request for a  
21 temporary restraining order, and that is that the relief sought  
22 here is extraordinary in that it would require that the  
23 authorities forego what is otherwise a constitutional search  
24 based on consent.

25 The decision to deny the temporary restraining order

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Argument

1 is strengthened by the fact that the plaintiffs conceded at the  
2 last hearing and appeared to concede today that they had  
3 insufficient evidence at this time to make a case for a  
4 preliminary injunction. If there is insufficient evidence to  
5 establish the requirements for a preliminary injunction, it  
6 also supports the denial of a temporary restraining order.

7 For the reasons that I've explained the application  
8 for a temporary restraining order is denied.

9 There is an application for expedited discovery, but  
10 as I indicated, the request is premature because there are no  
11 specific requests for discovery as to which expedition is  
12 sought and as to which objections could be raised.

13 If there are discovery requests and an application to  
14 have the discovery requests responded to in an expedited  
15 fashion more quickly than the Federal Rules of Civil Procedure  
16 would otherwise provide, the Court will consider that  
17 application and also consider whether the Court should  
18 supervise that discovery or assign it to the magistrate judge  
19 for the supervision of discovery.

20 So the request for a temporary restraining order is  
21 denied. To the extent that there is a specific request for  
22 expedited discovery it's denied without prejudice to renewal on  
23 the filing of specific discovery requests.

24 Obviously, when I deny a temporary restraining order,  
25 it doesn't preclude the plaintiffs from returning with another

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Argument

1 request for a temporary restraining order.

2 So, on the papers before me, the request for a  
3 temporary restraining order is denied.

4 OK. Thank you, all.

5 MR. GENNARDO: Thank you, your Honor.

6 MS. WOLSTEIN: Thank you, your Honor.

7 (Adjourned)

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